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No. 90-882

In The

Supreme Court of the United States

October Term, 1990

PAULA PHELAN, et al.,

Petitioners,

vs.

MICHAEL TAYLOR, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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INTRODUCTION

Respondents' Statement of the Case is misleading and inaccurate in its characterization of the nature and level of contacts between defendants and the State of Kansas.

Officers of the Kansas City, Missouri Police Department had contact with plaintiffs and their assailant, Michael Moore, in addition to those two discreet isolated occurrences on which the Tenth Circuit based its opinion. However, each of those other contacts occurred either in Missouri or through telephone exchanges initiated by plaintiffs with representatives of the Department in Missouri. Plaintiffs argue that "these contacts were with the State of Kansas." Brief in Opposition at 1. That statement is accurate only in the sense that plaintiffs and Moore were residents of Kansas at the time that they initiated contact with defendants in Missouri.

Respondents' Brief in Opposition is also misleading on the issue of whether defendants raised below the arguments on which they base their Petition here. In fact, defendants made the same arguments below and devoted an entire subsection of their Tenth Circuit Brief to the issues presented in the Petition.

ARGUMENT

I. DEFENDANTS ADEQUATELY RAISED BELOW THE ARGUMENT THAT BECAUSE THEY ARE STATE AGENTS, DUE PROCESS PREVENTS THE EXERCISE OF JURISDICTION OVER THEIR PERSONS.

Defendants' position has been consistent throughout this litigation. Based upon all of the facts and

circumstances alleged by plaintiffs, there are insufficient minimum contacts upon which to base the exercise of personal jurisdiction consistent with the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution. One of the facts and circumstances which defendants have always contended the courts must take into account is defendants' status as agents of the State of Missouri. Any difference in emphasis of that factor here as compared to below results from defendants' desire to focus upon the importance of the issue in order to demonstrate the reasons the Court should grant certiorari.

The basic premise of defendants' Petition is that the Court should grant certiorari to demonstrate that due process prohibits the exercise of long-arm jurisdiction over the agents or agencies of a State where the cause of action is based upon allegations that defendants deficiently discharged their sovereign responsibilities and their forum related contacts are merely incidental to efforts to perform those responsibilities. While defendants argued in the district court and in the court of appeals that their contacts with the State of Kansas were insufficient to provide a basis for the exercise of personal jurisdiction under any circumstances, the assertion that their status as agents and agencies of the State of Missouri must be taken into account is by no means new.[1]

The Summary of Argument in defendants' Tenth Circuit Brief explained that plaintiffs' allegations failed to

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[1] Even had the argument not been raised below, the Court would not be precluded from considering it. *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980).

demonstrate defendants had purposefully availed themselves of the privilege of conducting activities within the State of Kansas and that plaintiffs' claim was based rather on the unilateral activity of Michael Moore. The Summary then introduced the argument on which defendants' Petition here is based, stating:

> Furthermore, the exercise of jurisdiction in this case would be highly unreasonable considering the extent of the resulting conflict with the sovereignty of the state for which defendants act as agents.

Brief of Defendants-Appellees at 6. Defendants then divided their due process argument into three subsections, dealing with minimum contacts, purposeful activity, and the reasonableness of exercising jurisdiction under the circumstances. The third argument focused exclusively on defendants' character as state agents and agencies, on the relationship between sister states as coequal sovereigns, and on the potential impact of a rule that would subject state defendants to long-arm service of process under the circumstances of this case. That argument is set forth below:

> C. The Exercise of Personal Jurisdiction Over Defendants Would Not Be Reasonable.
>
> The consequences of accepting plaintiffs' arguments on these jurisdictional issues are immense. It is not reasonable to expect that either the perpetrator of, the victims of, or the witnesses to a crime will always remain in the jurisdiction in which the crime was committed. Therefore, the investigative activities of state law enforcement officers will often have consequences that extend beyond state lines. Each

state has been and should be free to fashion its own method of apportioning liability for any injurious consequences of the investigative activity of its law enforcement agencies through development of the public duty doctrine, sovereign immunity, and official immunity.

Plaintiffs seek to deprive the State of Missouri and the City of Kansas City, Missouri, of their control of these issues where investigative activities of Kansas City, Missouri Police officers allegedly cause injury, through the acts of a third-party, in Kansas. But the duties defendants are alleged to have breached herein are duties that arise by operation of Missouri law and are limited in territorial impact by the borders of the State of Missouri. Mo. Rev. Stat. §§ 84.420.1, 84.440, 84.710, 544.020; Rule 22.02(e), Mo. R. Crim. P.; *Rustici v. Weidemeyer*, 673 S.W.2d 762, 770 (Mo. banc 1984); *Settle v. State*, 679 S.W.2d 310, 317 (Mo. App. 1984). For a forum state to exercise long-arm jurisdiction under those circumstances constitutes an attempt by the forum state to establish itself as the superior to the other state. *Cf. World-Wide Volkswagen Corp., supra* at 291-92.

Such a violation of the defendant state's sovereignty is especially egregious if, as plaintiffs have argued, the forum state can then impose its own versions of public duty, sovereign immunity, and official immunity on the defendant state. Accepting plaintiff's arguments in this regard would result in a system wherein one state can dictate to the other the circumstances under which it will be held liable to citizens of the forum state in instances where the only contact between the forum state and the defendant state is the conduct of a third-party in committing crimes in both jurisdictions. In doing so, the forum state will seize control of such decisions as how many police officers,

> prosecutors, and judges must be employed by the defendant state to avoid liability that might be incurred through the failure to apprehend and process criminals in what the forum state might consider to be a timely manner, what jail and prison facilities must be built and how long convicts should be kept there to eliminate danger to the public, and how much the taxpayers of the defendant state are required to pay for protection from crimes for themselves and for citizens of neighboring states. Due process will not countenance such a result.

Brief of Defendants-Appellees at 26-28. Thus, there is no basis for plaintiffs' assertion that defendants have advanced a new theory here.

Plaintiffs are also wrong to assert that the issues presented by defendants' Petition are premature. The Petition does not request the Court to decide on the merits whether defendants can constitutionally be stripped of the sovereign and official immunities that are attributes of their positions as agents and agencies of the State of Missouri. Rather, it provides the Court with an opportunity to place critical limits on the scope of its holding in *Nevada v. Hall*, 440 U.S. 410 (1979), through a construction of the due process clause that would protect state agents and agencies from being required to respond in a foreign State to allegations that they have failed to perform their governmental responsibilities. The argument is addressed solely to personal jurisdiction.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition for Writ of Certiorari, the Court should grant the Writ.

Respectfully submitted,

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